

**COURT REPORTERS**  
OF AKRON CANTON AND CLEVELAND

Transcript of the Testimony of  
**Robert W. Vitale**

**Taken On:** February 19, 2008  
**Case Number:** 2:06-CV-2141-DGC

**Case:** Soilworks, LLC, vs. Midwest Industrial Supply, Inc.,

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UNITED STATES DISTRICT COURT  
IN AND FOR THE DISTRICT OF ARIZONA

- - -

SOILWORKS, LLC, an Arizona )	
corporation, )	
Plaintiff, )	
vs. )	CASE NO.
MIDWEST INDUSTRIAL SUPPLY, )	2:06-CV-2141-DGC
INC., an Ohio corporation )	ATTORNEYS' EYES
authorized to do business )	ONLY PORTIONS
in Arizona, )	CONTAINED WITHIN
Defendant. )	

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Deposition of ROBERT W. VITALE, a witness herein, called by the Plaintiff for Examination pursuant to the Federal Rules of Civil Procedure, taken before me, the undersigned, Binnie Purser Martino, a Registered Diplomat Reporter, Certified Realtime Reporter and Notary Public in and for the State of Ohio, pursuant to Notice and agreement of counsel at the law offices of Vorys, Sater, Seymour and Pease, LLP, First National Tower, 106 South Main Street, Suite 1100, Akron, Ohio, on Tuesday, the 19th day of February, 2008, commencing at 9:50

1 o'clock a.m.

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3

4 **APPEARANCES:**

5

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## I N D E X

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1 available information is included within the  
2 elements of at least one independent claim." Do  
3 you see where I am reading there?

4 A. Yes.

5 Q. And I read that correctly, didn't I?

6 A. Correct.

7 Q. The term "independent claim," refers to an  
8 independent claim of the '270 patent, correct?

9 A. I don't know. I mean, I don't quite  
10 understand the actual meaning of what you have  
11 just read.

12 Q. Okay. Turn, please, to page 6 of the  
13 exhibit, and I am going to direct your attention  
14 to interrogatory number 7. Okay?

15 A. Yes.

16 Q. And it may be necessary for us to dig into  
17 Binnie's pile there. Interrogatory number 7  
18 asks, "Please state each and every fact upon  
19 which you rely in support of your allegation in  
20 paragraph 18 of your counterclaims that  
21 Soilworks has used and continued to use one or  
22 more of Midwest's marks in commerce without  
23 Midwest's authorization. Please state which of  
24 Midwest's marks are allegedly to be used by  
25 Soilworks and how it is alleged that Soilworks

1 is using any such marks."

2 And your answer there on lines 19 and 20,  
3 "Subject to and without waiving the foregoing  
4 objections, Defendant responds, Ultra Pure,  
5 Synthetic Organic Dust Control and Oil-Sheen  
6 Free."

7 My question to you now is, the terms "Ultra  
8 Pure, Synthetic Organic Dust Control and  
9 Oil-Sheen Free" are not included within  
10 Midwest's marks as that term is defined in  
11 paragraph 18 of your answer and counterclaim,  
12 correct?

13 MR. SKERIOTIS: Objection.

14 BY MR. DOSEK:

15 Q. I am going to ask you to go back to  
16 paragraph 18.

17 A. I am reading that. Those words are not in  
18 this paragraph 18.

19 THE REPORTER: Is that the  
20 counterclaim?

21 THE WITNESS: Oh, excuse me.

22 (Pause.)

23 BY MR. DOSEK:

24 Q. Actually, what we need to do, sir, is go  
25 back to the previous page of the document that

1 you are looking at, paragraph 7 identifies those  
2 terms that are defined as Midwest's marks,  
3 correct?

4 A. Yes.

5 Q. Okay. And then paragraph 18 says that  
6 Soilworks has used and continues to use one or  
7 more of Midwest's marks in commerce without  
8 Midwest's authorization. Okay?

9 A. That's correct.

10 Q. Okay. Then going back to the second set of  
11 interrogatories, your response to our question  
12 about which of Midwest's marks are alleged to be  
13 used by Soilworks, your response is, "Ultra  
14 Pure, Synthetic Organic Dust Control and  
15 Oil-Sheen Free."

16 I am just asking you to confirm for me that  
17 those three terms are not included within the  
18 list of Midwest's marks as defined in paragraph  
19 7 of the counterclaim.

20 MR. SKERIOTIS: Objection.

21 THE WITNESS: That's correct.

22 BY MR. DOSEK:

23 Q. Okay. Turn then to page 7 of Exhibit 7,  
24 and I am going to ask you to direct your  
25 attention to the bottom, interrogatory number

1 10, and it goes over to the next page.

2 And you were asked to "State each and every  
3 fact upon which you rely in support of your  
4 allegation in paragraph 28 of your counterclaims  
5 that Soilworks has made false or misleading  
6 statements of fact in its commercial  
7 advertisements and promotions."

8 And I am going to ask you what false or  
9 misleading statements of fact that Soilworks has  
10 made and that you are referring to there.

11 **MR. SKERIOTIS:** Objection.

12 **THE WITNESS:** That it is  
13 synthetic, that it is Synthetic Organic Dust  
14 Control, circle R -- Synthetic Organic Dust  
15 Control is a registered trademark, that it is  
16 oil-sheen free, that it -- the phrase "ultra  
17 pure" may not be ultra pure, that it would have  
18 to go to their environmental claims.

19 **BY MR. DOSEK:**

20 **Q.** I just want to make sure I am clear with  
21 respect to the term "oil-sheen free."

22 **A.** Yes.

23 **Q.** Is it your allegation that the Soilworks'  
24 product is not oil-sheen free and they are  
25 claiming that it is?



1     A.     Yes.

2     Q.     Okay.  Is it also your allegation that the  
3     term "oil-sheen free" is a protected term of  
4     Midwest's?

5     A.     No.

6     Q.     What does the term "ultra pure" mean?

7     A.     Ultra pure, as I understand it, is a phrase  
8     used to describe something manufactured by a  
9     particular process.

10    Q.     Can you be more specific about the  
11    particular process you are referring to?

12    A.     It is -- in the case of Petro-Canada, it is  
13    the patented -- what they refer to as the  
14    patented HT process.  And that includes  
15    hydrocracking, all the way up through  
16    hydroisomerization.

17    Q.     Do you know where Soilworks obtains the  
18    ingredients that are used in the products that  
19    it sells?

20    A.     No.

21    Q.     Just check here.  We may be very close to  
22    being done.

23    A.     Good, that would be nice.

24    Q.     I didn't think you would argue about that.

25                   (Thereupon, a discussion was held off